In The

Supreme Court of the United States

October Term, 1955

No. 17

United Gas Pipe Line Company,

Petitioner,

v.

Mobile Gas Service Corporation and Federal Power Commission,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER UNITED GAS PIPE LINE COMPANY TO RESPONDENT MOBILE GAS SERVICE CORPORATION AND THE CITY OF TYLER AND TYLER GAS SERVICE COMPANY AMICI CURIAE.

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1. Mobile's Attempted Distinction Of Armour's Case Untenable.

Mobile (Br. 14-18) suggests *Armour* (209 U.S. 56 (1908)) is inapplicable because of the difference between the railroad industry and the gas industry so that there is a purported difference between the Interstate Commerce Act and the Natural Gas Act. Such differences are immaterial to Congressional intent. Both businesses are engaged in transportation and services connected therewith. In both Acts Congress regulates rates so that the same rate or a "just and reasonable" rate shall be applicable to all alike.

"Secret rebates", to prevent which Mobile suggests was the purpose of the Interstate Commerce Act, are no differ-

ent from "undue preferences or advantage", or "any unreasonable difference in rates * * *" etc., "as between localities or * * * classes of service" outlawed by Section 4(b) of the Act. Secret rebates for railroad transportation produces the very undue preferences and advantages and unreasonable differences in rates, charges, services, facilities, etc., which the Act prohibits.

If it be "clear" that "private rate contracts are outlawed" (Br. 15) by the Interstate Commerce Act, it is equally clear that the Natural Gas Act likewise outlaws such contracts. Mobile concedes that the underlying purpose of the Interstate Commerce Act was "* * * to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight and that the filed and published rate equally known by and available to every shipper" (Br. 14 from 209 U.S. 56 at 80). No better description can be written of the Congressional purpose in Section 4 of the Natural Gas Act. Comparison of the two Acts shows a substantial similarity in their provisions.

Mobile would have it that difference in permissive filing of contracts is significant. It is, but the conclusion Mobile draws is erroneous, for while the end result of the two Acts respecting contracts is the same, Congress in the Natural Gas Act took pains by the language of Sections 4 and 5(a) to spell out in detail the complete subjection of contracts to the purposes and procedures provided in the Act. Filing is not a touchstone of validity or enforceability. The underlying philosophy of the Act to establish a "just and reasonable" rate applicable to all without any undue preference or advantages or any unreasonable differences between rates either as between localities or classes of service renders all contracts or other arrangements interferring with such Congressional mandate "inoperative" or invalid or unenforceable, as the Fifth Circuit declares in

Mississippi Power & Light Company v. *Memphis Natural Gas Company* (1947) 162 F. 2d 388, cert. den. 332 U.S. 770. See, too, *Michigan Consolidated Gas Company* v. *Panhandle Eastern Pipeline Company* (D.C.E.D. Mich. 1948) 80 F. Supp. 27, affirmed 1949, 6 Cir. 173 F. 2d 784.

In its effort to create and nourish the notion that differences between the railroad and natural gas business make contracts in the gas business sacrosanct, Mobile points (Br. 18-19) to its assignment of its industrial sale contracts to United. It quotes testimony of United's witness, Mr. Pittman, at Docket G-6060 before the Commission as confirmatory. Mobile merely seeks deviation. Of course, contracts were the prevailing mode before the Act preempted control of the regulated field. Regulated contracts of interstate pipe line companies rate-wise are tied to the "cost of service" principle of the Commission. Freedom of contract thus disappears before the statutory requirement. Mobile points out the obvious fact that direct industrial sales by United under such assigned contracts are not subject to Commission jurisdiction. The quotation of the Pittman testimony (Br. 19) points to such contracts. Freedom to contract in that outside area exists. Unlike the regulated interstate pipe-line contract rate tied to cost of service, Mr. Pittman points out that direct industrial sale contracts are negotiated on the basis of "value of fuel" (Transcript, hearing G-6060, p. 33), which takes into account competitive prices and conditions. These assigned direct industrial contract sales being non-jurisdictional are thus not subject to the Act. Non-regulable contracts such as these can have no bearing here, for they cannot change the provisions of the Act or affect United's duty under Section 4, when arising, to file an increase in regulated rates without the prior consent of the buyer, even though the superseded rate be embodied in a contract.

It is worth remembering that Congress excluded direct industrial sales from jurisdiction of the Act because competition was considered protection enough.[1] Obviously the business necessities of industry require different treatment than the fluctuating demands of domestic users. Continuity of business practice requires a steady level of delivery which, considered against the competition Congress noted, is protection against exploitation; whereas the uneven use of the domestic consumer puts him at a disadvantage, thus creating the "public interest" committed to regulation.

Concededly, Mobile is fully aware of these considerations. In the same proceeding in which Mr. Pittman testified Mr. Maurice White, President of Mobile, was also a witness. In direct testimony prepared by Mobile's attorneys, he stated Mobile found the assignment of industrial contracts desirable because, inter alia, regulation under the Act, particularly the 30-day provision of Section 4(d) made it unfeasible to make a firm contract with such industries, particularly because they stated their dissatisfaction with the

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[1] The hearings on the Natural Gas Act with respect to direct industrial sales show:

1. H.R. 4008, introduced January 27, 1937, 75th Cong. 1st Sess., originally provided that the Act should not be construed as authorizing the Commission to fix rates for the sale of gas distributed locally or for the sale of gas for industrial use only. Commenting on a similar provision contained in a predecessor Bill, H.R. 11,662, introduced March 6, 1936, 74th Cong., 2nd Sess., Dozier A. DeVane, Federal Power Commission Solicitor, said:

> "Likewise, natural gas in the process of transportation in high-pressure mains in interstate commerce for industrial use is excluded upon the basis that such sale is made under highly competitive conditions and is not imbued with a public interest. In short, this subsection [Subsection 1(b)] limits the exercise of its authority to only those interstate activities which include natural gas intended for ultimate distribution to the public, as that phase of its activities places the natural gas company in the status of a public utility enjoying a monopolistic position subject to regulation in the public interest."

2. On March 25, 1937, at Hearings on H.R. 4008 before House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., William A. Dougherty suggested certain amendments to exclude from jurisdiction under the Act direct industrials and resales for industrial

uncertainty resulting from the 30-day possibility (Tr. 56).

On cross-examination by Commission Staff as to why Mobile had not brought to hearing its application before the Alabama Commission for increased rates, Mr. White was asked whether Mobile's over-all earnings would not permit an increase even though Mobile was incurring a loss on the particular sale to Ideal, bringing the answer "Yes. Our attorneys felt that, in view of our excess earnings at that time it wouldn't be in the public interest. Therefore the Commission wouldn't entertain the idea." (Tr. 64). Mr. White then admitted that the Alabama Commission ordered Mobile to refund excess earnings in the year 1953 (Tr. 64), even though the increased rates from United had been in effect for approximately six months.

If Mobile should be upheld in its contention that those subject to regulation can freely make contracts which will be valid and binding in accordance with their terms, despite

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use only, saying that industrial gas "is sold under a separate agreement or a separate rate schedule than applies to the gas that is sold for general use and therefore is a separate transaction." (p. 124.)

HR 4008 was amended by the House Sub-Committee as reflected by the Confidential Committee Print No. 1 dated April 22, 1937, 75th Cong. 1st Sess., and the present form of Section 1(b) was achieved. The italicized portions represent additions and changes made by the Committee; the print through which lines are drawn represents language deleted:

Section 1. (b)

"(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale *in interstate commerce* of ~~such~~ natural gas for resale ~~to the public~~ *for ultimate public consumption for domestic, commercial, industrial, or any other use*, and to natural gas companies engaged in such transportation or sale, but shall not apply to *any other transportation or sale of natural gas or to* the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. ~~Provided, That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges to the public for the sale of natural gas distributed locally or for the sale of natural gas for industrial use only.~~"

Consideration of these changes shows the Committee considered the provision of inapplicability, i.e., "to any other transportation or sale of natural gas" did the work of the stricken proviso, as so amended the provision of HR 4008 is identical with the language presently contained in Section 1(b) of the Act.

the regulation, then any natural gas company can negotiate contracts in the regulated area with the same freedom they now can a non-regulable contract. But Congress first must rewrite the Act, for a contract covering the subject matter regulated by the Act cannot be validly made and performed as contracts normally are; whereas contracts free from regulation are, and must be, performed in accordance with the law of contracts.

2. Mobile's Error Lies In Considering Contracts As Such Without Regard To The Effect Which The Act Has Upon Them.

Though expressly conceding power to subject contracts to the regulatory scheme and that the Interstate Commerce Act, for example, had such effect, Mobile says that in the Gas Act, Congress must be deemed to have known enough about the law of contracts to realize that no contract could be changed without consent of both parties (Br. 22), and relies on *Wichita's* case (260 U.S. 48 (1942)). The argument runs (Br. 35), that Section 20 of the Kansas Statute is like Section 4(d), but immediately concedes no similarity by the express admission that no rate filed under Section 20 of the Kansas Act could become operative by Section 20, whereas the changed rate filed under Section 4(d) of this Act "becomes effective in 30 days unless suspended, and becomes permanently effective after five months of suspension unless affirmatively found unreasonable by the Commission after a hearing under 4(e)". What a difference! This Court in *Wichita* held that no rate at any time under any condition could become effective under the Kansas statute except pursuant to the hearing and express finding required by Section 13. The Act provides no such scheme. Of course, Mobile is ill-advised in the use of "per-

manently effective" for no rate ever becomes "permanently effective" — all rates are always subject to change either by the natural gas company under Section 4 or by the Commission under Section 5.

Finally, Mobile (Br. 56) makes a concession peculiarly applicable to *Wichita's* case, when it says "* * * we do not think the citation of authorities from State courts, or even from this Court, when dealing with the construction of State statutes, as they have been construed by State courts, is of much assistance in construing the Natural Gas Act." We agree with Mobile (Br. 37) that *Wichita* involved a Kansas statute and followed what this Court found to be its interpretation by the Kansas courts, which "of course, was binding on this Court".

Mobile, ignoring the plain meaning of Section 4(d), asserts that it merely prohibits parties to a contract from changing contract rates without notice to the Commission and Public. Apart from the clear provision of Section 4(d) permitting changes in contracts by subjecting them to the scheme of Section 4, the trouble with Mobile's position is that if a contract covering a rate regulable by the Commission can be changed only by a 5(a) proceeding initiated by the Commission and no access to Section 4 can be had until the completion of the 5(a) proceeding, there would never be occasion for the 4(d) "notice", for the right requiring such 4(d) "notice" would be non-existent. Mobile concedes all through its brief that in a 5(a) hearing the Commission is obligated to set the "just and reasonable" rate thereafter to be observed. Notice of a rate so adjudicated to a party in the situation of Mobile would serve no practical or legal purpose.

The specious cry of "want of mutuality" (Br. 24) was fully exposed by this Court in *Union Dry Goods* (1919, 248 U.S. 372) and cases therein cited. Clearly disingenuous is

the suggestion that to follow the clear meaning of Section 4(d) would be to say that "Congress had delegated its power to abrogate contracts to one of the parties to the contract" (Br. 9). Congress established Section 4 as the hub of the Act, made contracts expressly subject to the scheme of the Section, required natural gas companies to comply, and vested its statutory agent with exclusive and adequate power to supervise and control.

Further in the teeth of the Act, Mobile suggests that parties to contracts fix rates, not the Commission; and that the Commission only reviews for the purpose of determining whether the parties have fixed rates within the "zone of reason" (Br. 9, 25). This premise is false because it assumes a power in "parties to a contract" not granted by the Act except to the Commission. The conclusion is thus equally false. The natural gas company is required by Section 4 always to file and propose such changes necessary to maintain just and reasonable rates.[2] The Commission is given power by Section 4 to determine whether such rates are just and reasonable, and to permit their becoming effective with or without hearing. Section 5(a) vests the Commission with power always to review a rate, whether fixed or merely permitted to be filed. Thus the Commission

[2] In FN 2 (Br. 4) Mobile's reference to the argument below is inaccurate. Counsel for Mobile in discussing the opinion of the Trial Court in *Tyler Gas Service Co. v. United Gas Pipe Line Company* (R. 73, et seq.) said (Tr. of oral argument, Third Circuit, p. 11):

> "Now, I don't propose that Mr. Fletcher will tell us that his company was acting in bad faith or had its fingers crossed and was trying to deceive the good citizens of Tyler when they made that representation."

Counsel for United answered that question (at p. 75, Trans. of oral argument) as follows:

> "Now counsel says, was it in good faith? In the Tyler case both sides stipulated that the latter was done and the contract executed in good faith. There was no question of bad faith. There was simply the question, the unfortunate question, that neither side went to the books, as they could have done, and perhaps should have done, to determine the status of the law, they just simply made the contract and they made the contract to meet that particular situation."

is relieved of any restriction from its prior act in permitting a rate then deemed just and reasonable to become effective. Mobile does not need to go to state statutes (Br. 26), for this Court in the *Montana-Dakota* case (1951, 341 U.S. 251) declared that a "just and reasonable" rate was not a pin point but an area, and that no one was entitled to a rate as reasonable or legal save to that level within such area made "specific" by the Commission. The determination by the Commission is accompanied by a considerable amount of discretion. The area furnishes the boundaries for judicial review under Section 19 to determine whether the end result of rate fixing by the Commission is to be approved. Of course, it is the public interest which requires contracts to be inferior to regulation, and not economic favoritism. None such is here involved, for here the Commission is exclusively authorized to determine what is "just and reasonable" and to fix the rates in accordance therewith. This duty in the public interest is superior to private contract. Mobile's argument is without force.

3. The Effect Of Filing Of The Conversion Tariff Upon The Contract.

Mobile suggests (Br. 6) that this issue is not properly before the Court. It is of the utmost significance to note that Mobile does not deny the devastating fact that the suit contract was replaced and superseded by the conversion tariff; it grumbles only of its dislike of the protocol of recognition of such destruction. A dead contract is not revitalized by seeking to hide its death.

The orders of the Commission are subject to judicial notice and knowledge. The authorities make clear that all of such matters being a part of the archives and official records of the Commission will be considered by the Courts, irrespective of whether they are in the particular record.

See Ground 4, Footnote 53, p. 74, United's brief. Mobile does not answer or meet these authorities, nor the fact that the decision in *Tyler's* case is authority for the fact that the filing of the conversion tariff superseded the contract, after which the contract was no longer in existence. (See p. 5-7 United's brief.) In addition, Mobile quotes (Br. 7) out of context an excerpt from an order of the Commission overruling application for rehearing in Docket R-107. The excerpt in its proper context is as follows:

> "As stated in Order No. 144, Sec. 154.85 of the newly amended regulations expresses 'the Commission's intention to permit contracts now on file as effective rate schedules to continue in effect as executed service agreements until they expire or are superseded.' The regulation neither requires that existing contracts remain in effect nor that they be changed. It is permissive only.
>
> "The right of a natural-gas company, as given by the Natural Gas Act, to make changes in filed rate schedules, tariffs and contracts is preserved, as it must be. The amended regulations do, however, impose certain conditions which must be satisfied by any natural-gas company which proposes to change any such filed rate schedule, tariff or contract. Among other things, it must (1) give adequate notice as required by Section 4(d) of the Act and Sections 154.16 and 154.22 of the regulations, including service upon each affected customer; and (2) furnish to the Commission information as to the reasons and justification for the proposed change, as required by Section 154.63 of the amended regulations. Moreover, Section 154.27 permits affected customers, and other interested parties, to submit comments concerning such proposed changes, without limitation of any right to protest or complain.
>
> "In the light of these statements, it should be clear that Section 154.85 does not express a new policy of

the Commission or a new construction by it of provisions of the Natural Gas Act." CCH Utilities Law Reporter, Federal Transfer Binder, 1947-1951, Decisions R. 9090.

Properly quoted the order of the Commission confirms the contentions and position of United.

4. Mobile's Cases Are Not Apropos.

Mobile does not meet or answer the points and authorities in United's brief. Save for a few ineffectual generalizations, it does not attempt to discuss them. Instead it cites cases not dealing with the matters at issue here.

Its misapprehension of *Armour* (209 U.S. 56 (1907)) and the inappositness of *Wichita* (260 U.S. 48 (1922)) have been demonstrated. While conceding that *Midland* (300 U.S. 169 (1937)) supports United's position, it seeks to escape it on insupportable grounds exposed in United's brief (p. 62, Fn. 50 p. 63-4).

With the air of great discovery, it cites (Br. 25-6) three cases discussing the so-called "zone of reason" *Wichita Gas Co.* v. *Public Service Com.* (D.C. Kan. 1933) 2 F. S. 792, modified (1934) 290 U.S. 561; *Washington Gas Light Co.* v. *Baker* (D.C. Cir. 1950) 188 F. 2d 11, cert. den. (1951) 340 U.S. 952; *United Railways & Electric Co.* v. *West* (1930) 280 U.S. 234, 251). None involve the Act or are shown to turn on statutes having any similarity to the Act. None remotely suggest support for Mobile's claim that a filing within the "zone of reason" drains all regulatory power from the administrative agent, leaving it mandatory for the administrative agent to accept in toto. Speculation about a "zone of reason" is unnecessary in the face of this Court's clear holding in *Montana Dakota* ((1951), 341 U.S. 246, 251), defining the "area" of "just and reasonable" under the Act, and the broad power in the Commission exclusively to make specific the point within the "area" at which the approved rate shall be fixed.

The same ostrich behaviorism marks its discussion of *Union's* case ((1919) 248 U.S. 372) for Mobile refuses to recognize or credit the fact that the opinion of the Georgia Commission (Pet. App. p. 13) clearly establishes that there was no administrative hearing on the application of Union Dry Goods' supplier, and thus no hearing or evidence that any contract was against the public interest such as Mobile contends for here. The opinion also shows that at the particular hearing, no evidence was taken on the contract situation; there was received only a protest on ground of law. Equally clear is the legal fact that the Georgia Commission and Courts rested their decision on the ground that fixation of rates *pursuant to statutory* procedures as a matter of law superseded and rendered nugatory all conflicting contractual arrangements.

Mobile repeats (Br. 46-48) its attempted distinctions of *Tyler's* case (D.C.E.D. Tex. (1953) R. 73, aff. 5 Cir. 1954, 217 F. 2d 73) made in its Opposition Brief (p. 11-3) which were demonstrated to be incorrect in United's Reply to Opposition (p. 1-4). (See, too, p. 69-73 United's main brief.) Tyler Gas Service Company and the City of Tyler have filed herein a brief styled "Amici Curiae" in support of Mobile, and the *Tyler* case will be noticed further in the reply thereto.

At Br. 49 under the heading "The Majority View", Mobile discusses cases involving State statutes. They do not assist Mobile.

In *Commonwealth v. Shenandoah River Power & Light Corporation* (1923) 135 Va. 7, 115 S.E. 695, the Supreme Court of Virginia stated that there were only "slight differences between the Kansas statutes which were under review in that case [*Wichita R.R. v. Pub. Util. Comm.* 260 U. S. 48] and the Virginia statutes", and after quoting from *Wichita's* case held that the Virginia statute "clearly

indicat[ed] the limiting conditions precedent" to the abrogation of contract, i.e., that the contract rate should be "found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of the law" (p. 702). Thus the Virginia statute is like the Kansas statute which this Court in *Wichita* held permitted no change at any time in any rate except upon the express finding of unreasonableness. *Wichita's* case has been demonstrated inapplicable.

Mobile next cites (Br. 49) *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.* (1924, D.C.R.I.) 295 F. 895. This case shows that the Rhode Island statute is also like that of Kansas and was distinguished in United's brief, p. 78.

In the same vein Mobile quotes from *Rutland Railway, Light & Power Co.* v. *Burditt* (1920) 94 Vermont 421, 111 Atl. 582, but fails to advise this Court that the Vermont statute as cited by the Court:

> "* * * provides just two ways by which the rates are fixed or changed: Either by agreement, or by the public service commission, upon due notice and hearing." (p. 53.)

Mobile's quotation is thus put in its true light, for there the utility was adjudged undertaking to proceed without statutory authority. Decisions under such a statute can throw no light upon the vastly different Act here.

Re Searsport Water Co. (1919) 118 Me. 382, 108 Atl. 452, is no better. Looking at the Maine statute, the Court said that a presumption of reasonableness arose and controlled until unreasonableness was otherwise determined by the Commission after hearing upon complaint of the consumer under Section 43, of the utility under Section 50, or upon the Commission's own motion under Section 48, all three

sections being a part of Chapter 55 of the Maine Statutes (p. 4-7-8). Thus, Maine contemplated preservation of contract rates until a hearing and expressly authorized the utility to complain of unreasonableness.

Congress in Section 5(a) denied the natural gas company the right to complain of unreasonableness of an existing rate whether fixed by contract or otherwise. The balancing requirement upon the natural gas company by Section 4 to charge only just and reasonable rates with unhampered duty to propose changes to preserve justness and reasonableness gave flexibility and vitality to a design which would produce maximum protection for the public interest proposed to be preserved. Judicial holding (see p. 57, Fn. 42, United's brief) that the Commission in a 4(e) hearing has all of the powers it can exercise in a Section 5(a) proceeding demonstrates the meticulous care with which Congress ordained that all rates, whether fixed by contract or otherwise, should always be subject to the balancing powers vested in the Commission by Sections 4 and 5(a).

Winfield v. *Public Service Commission of Indiana* (1918) 187 Indiana 53, 118 N.E. 531 (Mobile Br. p. 51) has nothing whatever to do with this case. The State of Indiana gave the town of Winfield a charter empowering it to contract in a proprietary capacity, which it did by executing a franchise for utility services stating maximum rates. Thereafter the State created the Commission as its administrative agent to regulate rates. The question was whether the power to contract granted in the charter prevented the State, under its police power, from exercising its sovereign power to regulate rates, whether up or down. The Court held such regulation not prevented, because the State had not waived its police power right to regulate.

Finally, Mobile cites (Br. 51) *Birmingham Electric Co.* v. *Alabama Public Service Commission* (1937) 233 Ala. 675,

173 So. 19. This case arose on demurrer to defendant's bill of complaint attacking the validity and effectiveness of the Commission order. The Court repeatedly emphasized that in determining such demurrer it could "only consider the averments of the bill and its exhibits" (p. 20). Mobile's statement of what the rule of the case "appears to be" is shown to be the appellant's contention (p. 20). The Court's holding is as follows:

> "Without considering the question of whether the State Legislature has the right to set aside a contract so approved or to authorize the Public Service Commission to do so, we think that the Legislature has not so authorized the Commission, and that it cannot do so, without the consent of the parties." (p. 20.)

Thus the statute considered in that case like the Arkansas statute in *Arkansas Natural Gas Company* v. *Railroad Commission* (1923) 261 U.S. 379 (p. 79 United's brief) denied the Commission power to change or abrogate a contract, a point Mobile finally admits after much prodding (Mobile's Br. 29). Even though its attorneys "expressed some doubt" (Tr. Docket G-6060, p. 63) whether its Ideal contract could be reopened in view of Commission approval, Mobile's filing to the Alabama Commission and the compelling reasons for not prosecuting it to hearing (see p. 5 above) are highly persuasive that Mobile did not regard *Birmingham Electric* as declaring lack of power; rather, it points to excess earnings as dictating the choice to allow its application to lie fallow.

Thus the heading "The Majority View" (Mobile's Br. 49) upon examination is shown not to be a majority of anything. It demonstrates only that Virginia and Rhode Island have statutes like Kansas and that Vermont and Maine have still different statutes; but none of them are comparable to the Act. In truth, because of the peculiar face of such statutes, they represent a very small minority view.

Under the incorrect heading "Minority View" (Br. 51) Mobile unsuccessfully seeks escape from citation of state cases under statutes similar to the Act. Mobile cites *Hackensack Water Co. v. Board of Public Utility Commissioners* (1921) 96 N.J. L. 184, 115 Atl. 528. There, the Court affirmed an increase over rate agreements for water supply with 46 municipalities pursuant to a "unilateral" filing, followed by suspension and hearing, under a statute (quoted in part p. 530) comparable to Sections 4(d) and 4(e) of the Act. Instead of so filing under its contract with Hoboken, it sought a hearing under another section comparable to Section 5(a) (revised statutes 1937, Section 48: 2-21 b(1)) for the granting and determination of the amount of an increase. The Court reversed the Board, holding that contracts were subject to change and supersession under the Act. Applicability to Hoboken of the procedure applied to the 46 municipalities was neither presented nor discussed. In discussing ampleness of the state's statutory power the Court said:

> "It may be conceded that neither the City of Hoboken nor the water company can alter this contract without the consent of the other party to it, * * *" (p. 531).

This dictum is obviously addressed to the contract outside the statute; for the agreements of the other 46 municipalities had been altered, changed, and even abrogated by the statutory proceedings comparable to Sections 4(d) and 4(e).

In *Harrison* (New Jersey Suburban Water Co. v. Town of Harrison (1938 120 N.J. L. 546, 1 A. 2d 61), the Supreme Court said the quoted phrase from *Hackensack* was not essential to the decision but was a mere "concession" made argumentatively and not as a legal pronouncement. It followed this Court's decision in *Midland Realty Co.* v. *Kansas*

City Power & Light Co. (1937) 300 U.S. 109, quoting the holding that a rate filed by the utility and promulgated by the Commission in accordance with the statute had the same force as though directly promulgated by the legislature.

The Court of Errors and Appeals (1939) 122 N.J.L. 189, 3 A. 2d 623) reversed, holding the utility estopped to assert the filing was properly under the change of rate section comparable to Sections 4(d) and 4(e). It did not affirm its dictum in *Hackensack* as controlling *Harrison*, nor deny that a proper filing of changed rates under Section 48: 2-21 d (i.e. Section 4(d) and 4(e).) would validly and successfully effect a change of rates embraced in a contract. Estoppel was applied to prevent the change impliedly adjudged, otherwise change would have resulted. If its view was consonant with Mobile's contention estoppel was unnecessary, for the filing as claimed by *Harrison* would have been sterile and easily so stated.

It seems clear that a filing as to *Hoboken* and in *Harrison* like that applicable to the 46 municipalities in *Hackensack* would have produced the proposed change of rate. This is strongly supported by the Court's statement (p. 627):

> "If the stipulation adverted to had not been made, and the Board had exercised its power of suspension, the statutory limitation would furnish, as it was manifestly intended to, a cogent reason for action by the Board within the six months' period." (p. 627.)

Such hearing under Mobile's contention could not have been held for the filing, being illegal, would not have invoked the administrative duty.

One other illustration of the error in Mobile's thinking is deemed sufficient. Discussing certain New York cases (Br. 53) it states that *In re Dry Dock E. B. & B. R.R. Co.*

(1932) 254 N.Y. 305, 172 N.E. 516, refused to follow *Town of North Hempstead* v. *Public Service Corporation* (1921) 231 N.Y. 447, 132 N.E. 144, and *Public Service Commission* v. *Pavilion Natural Gas Co.* (1921) 232 N.Y. 146, 133 N.E. 427, and limited those cases "to the precise circumstances under which they arose". *In re Dry Dock* does not do any of those things.

Dry Dock attempted to increase by filing changes pursuant to Section 29 of the statute. The Court held that Section 29 applied only to those rates which, at common law, a utility or carrier could increase, whereas rates in a franchise granted by the Legislature could only be changed by the Legislature, and was outside the statute. (*People ex rel Garrison* v. *Nixon* (1920) 229 N.Y. 575, 128 N.E. 255, 256). By Section 49 it held the Legislature authorized the Commission thereafter to change such legislative franchise rates upon a finding of unreasonableness. Thus Section 49, not Section 29, was open to Dry Dock. There being no power to change those rates under Section 29, and considering the purpose of Section 49, there was no room for implication of power under Section 29 as was done under an "*analagous*" section of the statute in *North Hempstead*, a method of implication which might "appear defective and illogical".[3]

[3] The *North Hempstead* case was under Section 66 the "analagous" section of the same law, and was a provision for a change of rate by filing. The franchise was granted after the enactment of Section 66, so that the Court held that such Section "entered by implication into the terms of such consent; formed part of its obligations; and were notice to the Town that the consent was coupled with the provision of the statute that the defendant was empowered to abrogate it as to the rates stipulated therein, and was allowed by law to put into operation a new schedule of just and reasonable rates * * * on 30 days' notice to the Commission and publication for 30 days as required by order of the Commission." (p. 144-145.) The Court held that this power was balanced, for the town was protected by its right to complain under Sections 71 and 72, thus invoking determination of what would be "adequate, just and reasonable rate." See comparable holding relative to Section 5(a) in *Mississippi Power & Light Company* v. *Memphis Natural Gas Company* (1945) (5th Cir.) 162 F. 2d 388; cert. den. 332 U.S. 770.

Quotation of the holding in *North Hempstead* dispels the obscurity of Mobile's excerpt quoted Brief 53. The Court said:

> "This method of increasing rates without first obtaining an adjudication as to their reasonableness may appear defective and illogical, but no constitutional limitation or legislative power interdicts it, and no exception in favor of rates stipulated in a municipal consent granted subsequent to the enactment of the Public Service Commission's Law can be read into it without doing violence to the plain language of the statute." (p. 145.)

The excerpt from *Dry Dock* (Br. 53) is taken out of context. In its proper context Mobile's position is untenable, and the Court's meaning plain:

> "Certainly we may not strive, by forced constructions of the language of the statute, to find a legislative intent to authorize a method which 'may appear defective and illogical.' Under Section 49 of the Public Service Commission Law, the Legislature has delegated to the agency created by it the power, which the Legislature always possessed, to change maximum rates contained in earlier statutes when it appears that these rates are unjust and unreasonable, and the same section provides the method by which the agency may be called upon to act * * * Section 29 merely gives the Commission power to suspend a proposed increase and after a hearing to make its own order regulating the rate to be charged where, except for such suspension or new order the proposed increase would be lawful." (p. 519.)

Dry Dock (p. 519) neither criticizes *North Hempstead* and *Partition*, nor restricts them. It demonstrates why the rule there would not apply to *Dry Dock*. Conflict with *North Hempstead* and *Partition* is expressly denied by that Court (p. 519-20).

5. The Question Of Reparations And Refunds Which The Court Below Ordered.

Without meeting the authorities or answering the manifest lack of power of the Court below to order reparations, Mobile in one paragraph simply declares its right to reparations because the rates collected were allegedly "illegal," but in the following paragraph denies the Court reached the issue of the repayment which it ordered.

Of course the only "illegal" rate contemplated by the Act is one other than the filed rate. The order of the Court below requiring refunds of the "filed" rate would have effect to restore and establish the contract rate, which in turn had been superseded by the conversion tariff rate. The *Hackensack* case (1921) 96 N.J.L. 184, 115 Atl. 528, which Mobile cites (Br. 52) thus perfectly describes the action of the Court below in its invasion of the Commission's function to fix rates:

> "The action of the Supreme Court, in declaring the rate to be fixed by the Board, is in disregard of this statutory power conferred upon the latter, and which it is entitled to exercise without any limitation put upon it by the Court. The power to fix rates is not a judicial function, but a legislative one, and the state had created the Board of Public Utility Commissioners as its agent for that purpose. An attempt by the Supreme Court to fix a rate is in its essence an attempt to exercise a sovereign power which has not been delegated to it by the state, but which resides solely in the legislative and executive branches of the government." (p. 532.)

6. Reply To Paper Styled "Memorandum Brief In Support Of Mobile Gas Service Corporation For The City Of Tyler, Texas, And Tyler Gas Service Company Amici Curiae."

United has received through the mail an extraordinary paper styled as above, and though styled "In support of Mobile Gas Service Corporation," the document (p. 7-12) attacks what it conceives to be the holding of the Court below on the *Tyler* case as erroneous, a decision which Mobile here seeks to sustain. Mobile itself has sought to demonstrate that *Tyler* is an entirely different animal. (Mobile's Br. 46-7.) Primarily the Tyler document is an attempt to secure a review for Tyler Gas, though neither the City of Tyler or Tyler Gas took timely steps to petition this Court for a writ of certiorari. The decision of the United States Court of Appeals for the Fifth Circuit (No. 15034) in *Tyler's* case was filed on November 24, 1954, and is reported at 217 F. 2d 73. The decision of the District Court for the Eastern District of Texas is unreported but appears in the record hereof beginning page 73.

In the pleadings, by appearances in the Trial Court, and on the briefs both to the Trial Court and the Court of Appeals, Thomas B. Ramey, Esquire, and Bryce Rea, Jr., Esquire, appeared for Tyler Gas Service Company, and Troy Smith, Esquire, appeared for the City of Tyler.[4] Counsel for United, believing counsel for Mobile able ade-

[4] Transcript of record, United States Court of Appeals, 5 Cir. No. 15034, *Tyler Gas Service Company and the City of Tyler, Texas* v. *United Gas Pipe Line Company*: at page 25, signatures on joint bill of complaint show Thomas B. Ramey, Bryce Rea, Jr., "Attorneys for Plaintiff, Tyler Gas Service Company;" and Troy Smith, "Attorney for Plaintiff, City of Tyler." The transcript of record (p. 279) shows the same attorneys for Tyler Gas, and in addition to Troy Smith, Esquire, Ted Chilcoate, Assistant City Attorney, of Tyler, appeared in the trial court for the plaintiff The City of Tyler.

Mr. Rea was introduced to the Court by Mr. Ramey as "Of counsel for the Tyler Gas Service Company," same record, p. 225.

quately to present all questions of fact or law relevant to the disposition of the case, declined a request of counsel for Tyler Gas for consent to file a brief amicus curiae.[5] No motion was ever filed or served on United by Tyler Gas Service Company pursuant to Rule 42, Subdivision 3 of this Court.

The brief of the City of Tyler and Tyler Gas Service Company (Tyler Gas) is a melange of contentions, most of

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[5] Counsel for United received a letter dated March 10, 1955, on the letterhead of the Law Offices of Bryce Rea, Jr., Washington, D. C., as follows: (Emphasis shown as contained in original letter)

"Re: Federal Power Commission vs.
Mobile Gas Service Corporation.

"Dear Mr. Fletcher:

"As you, Tom Ramey, Louis Da Pra and I know so well, the basic problem in the *Mobile Case* and in the *Tyler Case* is the same. The *Tyler Case* has been and will be discussed and argued in the Supreme Court by the parties to the *Mobile Case*. In view of this and in view of the fact that Opinion and Order No. 277 leaves the issues therein between United and Tyler open and provides for further proceedings thereon, we should like to file a brief *amicus curiae* in the Supreme Court in support of Mobile and for the purpose of helping to put the *Tyler* opinion of the Fifth Circuit in perspective. We think this will be helpful to the Court, and to the expeditious final settlement of our case and of fundamental issues, and thus to the mutual benefit of all concerned.

"Since it is simpler under the Rules of the Supreme Court to file an *amicus* brief with the consent of the parties than to file after leave granted upon motion therefor, it would be appreciated if you would consent unless you would expect to object to a motion for leave to file. I have discussed the matter with the Commission, asked it to consent and expect that it will.

"Please let me hear from you as soon as you conveniently can. If you consent, a simple letter to me to that effect is all that is necessary.

Sincerely,

/s/ BRYCE REA, JR.
Bryce Rea, Jr.

BR/db
CC/Thomas B. Ramey, Esq."

United's counsel replied to Mr. Rea on March 11, 1955, with copy to Thomas B. Ramey, Esquire, and copies to associate counsel for United, W. O. Crain, Esquire, and C. Huffman Lewis, Esquire, as follows:

"Re: United Gas Pipe Line Company v.
Mobile Gas Service Corporation

"Dear Mr. Rea:

"I have your letter of March 10, 1955, requesting my consent for you to file an amicus curiae brief in the above cause.

"I am not able to give you the consent requested. My petition for

which were expressly adjudicated against them by the courts and incorrect statements, a few of which will be noticed to demonstrate the inaccuracy of the document.

1. The scope of the hearing in the Trial Court (Tyler Gas Br. 4-7) is incorrectly and too narrowly stated. Tyler Gas overlooks the fact that United's position in opposition both to the injunction and to the bill in its entirety was by

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certiorari was filed in the above matter on November 8, 1954. The decision of the United States Court of Appeals for the Fifth Circuit in Tyler Gas Service Company v. United Gas Pipe Line Company, was filed November 24, 1954. The ninety days for filing petition for certiorari to the decision in the Tyler Gas Service case expired February 22, 1955.

"I am convinced that the attorneys for Mobile Gas Service Corporation will adequately present all questions of fact and law bearing upon the issues in the above case from their viewpoint ably and efficiently.

Very truly yours,

/s/ THOMAS FLETCHER
THOMAS FLETCHER

TF:ec"

Copy of the letter to Mr. Rea was forwarded to the Solicitor General of the United States and interested attorneys for the Federal Power Commission.

Thereafter, United's counsel received through the mail a copy of a letter written by the Solicitor General of the United States dated March 18, 1955, also addressed to Mr. Rea, as follows:

"Re: Federal Power Commission v.
Mobile Gas Service Corp.,
U. S. Sup. Ct., No. 556, Oct. Term, 1954

Dear Mr. Rea:

"I have your letter of March 9, 1955, requesting the consent of the Federal Power Commission to your filing an *amicus* brief on behalf of Tyler Gas Service Company in the above-captioned case.

"Since I understand that counsel for United Gas Pipe Line Company has declined his consent in the companion case, involving the same issues, there seems little purpose in my taking any action on your request. However, I should point out that, while it is the policy of this Office to consent to the filing of *amicus* briefs on behalf of a party to a case pending in the courts raising the same or closely related issues, the Fifth Circuit's opinion in the *Tyler* case has by now become final.

Sincerely yours,

SIMON E. SOBELOFF,
Solicitor General."

The copy sent to United's counsel also shows copy to Willard W. Gatchell, Esquire, General Counsel of the Federal Power Commission.

motion to dismiss for want of jurisdiction and for want of equity, and for failure to state a claim. The scope of the hearing is accurately delineated by Chief Judge Hutcheson in his opinion in the case (*Tyler Gas Service Company* v. *United Gas Pipe Line Company* (1954) 217 F. 2d at p. 74-5).

2. Tyler Gas says (Br. 7) that its intervention at Docket G-2210 before the Federal Power Commission has not yet been finally ruled. It is true that the Commission in opinion and order 277 issued November 2, 1954, prior to the decision by the Fifth Circuit in Tyler Gas's case on November 24, 1954, held open said Docket at the request of Tyler Gas for the conclusion of the Court proceeding. The intervention raising the same issues raised in the court proceeding, the Court decision is conclusive of the issues sought to be raised by Tyler Gas in said intervention.

3. The statement is made (Br. 3) that the contract between Tyler Gas and United "committed United not to increase those rates for a period of sixteen years". Such was the contention advanced by Tyler Gas as the effect of said contract; said contract nowhere contained express language of agreement by United that it would not increase said rates.

4. It is said (Br. 7) that the decisions of the District Court and of the Court of Appeals was nothing other than that Tyler Gas and Tyler had not exhausted their administrative remedies. United in its brief (p. 69-73) has demonstrated such statement to be incorrect.

5. Tyler Gas says that the District Court and the United States Court of Appeals for the Fifth Circuit, and the Court below in Mobile, were all wrong in saying that the

"conversion tariff" modified or changed its contract (Br. S-10). The short answer is that the District Court so held; the Court of Appeals affirmed, and both judgments and decisions are long since final.[6]

6. Contention is advanced (Br. 9) that United's filing pursuant to Section 4(d) was "unilateral" and thus invalid. Again, both courts expressly repudiated this contention and those judgments are now final and conclusive upon Tyler and Tyler Gas.[7]

7. Challenging holdings both by the District Court and the Fifth Circuit, Tyler Gas and Tyler deny they admitted power in the Commission under the Act pursuant to Section 4 to fix rates at variance with contract rates (Br. 10-11). The holdings thereon of the Courts by which Tyler and

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[6] Decision of the District Court holding that the conversion tariff replaced, superseded and modified the contract which had not been in force for some months appears in this cause (R. 75-6, 79-80). The Fifth Circuit quoted this with approval in footnote 3, 217 F. 2d, at 75-6.

The pleading and protest of Tyler Gas to the Commission protesting the conversion tariff was Exhibit No. 22 of Tyler Gas, the same as Exhibit "A" to United's motion. (See record, Cause No. 15034 in the United States Court of Appeals for the Fifth Circuit, p. 187-90.) Mr. J. W. Hickman, President of Tyler Gas, testified that the protest was prepared by his Dallas attorney and transmitted to the Commission pursuant to his instructions (R. No. 15034, United States Court of Appeals for the Fifth Circuit, p. 288). The prayer of the protest sought a hearing (R. No. 15034, United States Court of Appeals for the Fifth Circuit, p. 83). The order of the Commission at Docket G-2019 permitting the conversion tariff as to Tyler Gas to be filed appears here (R. 60).

On cross-examination Mr. Hickman testified, and it was thereupon conceded by counsel for Tyler Gas, that no appeal pursuant to Section 19(b) of the Act was taken from the order permitting the conversion tariff to be filed. (R. No. 15034, p. 305.) Relying on *Sunshine Anthracite Coal Company* v. *Atkins* (1940) 310 U.S. 381, United's position, which the Courts sustained, was that the conversion tariff superseded the contract which thus had not been in existence for months.

[7] Holding of the District Judge, R. 78-9; express concurrence of the Fifth Circuit, 217 F. 2d at p. 78.

Tyler Gas are concluded are abundantly supported by the record.[8]

Mobile's case was argued to the United States Court of Appeals for the Third Circuit on May 19, 1954. When Tyler Gas and Tyler filed their brief in the *Tyler Gas* case in the Fifth Circuit the latter part of August, 1954, the Tyler Gas position was changed and Tyler Gas sought to embrace Mobile's position respecting Section 5(a). United noting

[8] From the brief of Tyler Gas to the District Judge:

(a) "In a word, the extent of the relief herein sought by the plaintiffs is simply the maintenance of the status quo of the existing rate schedules until such time as the Federal Power Commission shall have rendered an adjudication on the pending application of United for an increase in rates. * * * No question is raised as to the power vested in the Federal Power Commission to regulate the rates charged by United to Tyler Gas, nor do we question here the authority and prerogatives of the Federal Power Commission to modify or amend the rate schedule prescribed in the existing contracts. * * * Furthermore, no attack is here made upon any other action heretofore taken by the Federal Power Commission. Simply stated, plaintiff's position is that inasmuch as the Federal Power Commission has not yet made a decision respecting the justness, reasonableness and lawfulness of the revised schedule of rates, the existing contract rates should be permitted to stand until such time as the Federal Power Commission does reach and announce a decision with reference to same." (p. 6-7.)

(b) "Expressly recognizing that the proposed increase in rates 'may be unjust or unreasonable or otherwise unlawful,' by its order issued July 10 the Commission suspended said rates until December 25, 1953, and 'until such further time as said proposed revised sheets may be made effective in the manner prescribed by the Natural Gas Act.' Thereby the Commission exhausted its statutory power to 'suspend and defer the effectiveness of such rates.'" (p. 18-19.)

(c) "The filing of new rate schedules with the Federal Power Commission by Defendant without the consent of Tyler Gas on June 24, 1953, did not modify the contract between Tyler Gas and Defendant. To effectuate modification one of two things was necessary, namely, either failure of the Commission to act for a period of thirty days, or an order of the Commission permitting or requiring the proposed rates to become effective. Neither of these things took place. Instead, the Commission, acting under Section 4(e) of the Act upon a finding that the new rates may be unjust and unreasonable, suspended their use for a period of five months, and ordered a hearing to be held respecting their justness, reasonableness and lawfulness. Under Section 4(e) that power having been exercised, the proposed rates can become effective only upon an order of the Commission after the conclusion of the proceedings or upon a motion by Defendant made at the expiration of the suspension period, by which motion the suspension is lifted and the rates become effective even though the proceedings to determine their lawfulness have not been concluded." (p. 30-1.)

this change accepted it, contesting it on the same grounds and authorities relied on in the Court below. The Fifth Circuit did not accept the contentions of Tyler Gas based upon Section 5(a) of the Act. (217 F. 2d 73.)

8. Tyler Gas says that its bill of complaint had also tendered allegations about resale for industrial use only rates, and admits that they had gone into effect (Br. 11-12). The claims on these were waived to the Trial Court.[9]

9. At various places Tyler and Tyler Gas assert there was a contract between the City of Tyler and United. United denied a contract and asserted no power in the City of Tyler to make a contract as claimed. The Trial Court expressed "difficulty spelling out all the elements of a contract between United and City, * * *" (R. 80) but concluded that the presence of the City as a party did not strengthen the position of Tyler Gas and thus found it unnecessary to determine the question (R. 80). The Fifth Circuit concurred, 217 F. 2d at 75.

10. The "Amici" nowhere pose any position or contention on behalf of the City of Tyler which bears on any point or question for decision in this case — there is only presented errors which Tyler Gas complains were com-

[9] Upon the pleading tendering issues on industrial rates which were already in effect United by motion asserted that the Commission and interested parties were indispensable parties if the Court was to require the Commission to recall such order. In response to that, Thomas B. Ramey, Esquire, leading attorney for Tyler Gas, said to the Court:

"* * * the industrial rates have already been put into effect; therefore, we are pretermitted from the consideration, so far as we are concerned, of the Court, for in our application for temporary injunction, any application to the industrial rate." (p. 225, R. in No. 18034, United States Court of Appeals for the Fifth Circuit, Tyler Gas Service Co., et al v. United Gas Pipe Line Company.)

mitted against it in a decision against which it sought no review.

Respectfully submitted,

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